89-1634

Supreme Court, U.S.
FILED
APR 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, Appellee/Respondent

v.

STEVEN LYMAN, Appellant/Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

IN PASSING 18 U.S.C. § 924(c)(1) DID CONGRESS INTEND THAT BECAUSE A DEFENDANT HAS A GUN IN HIS APARTMENT WHERE COCAINE IS STORED, A GUN HE BOUGHT YEARS EARLIER AND HASN'T USED SINCE, AND WHERE THE CONNECTION BETWEEN THE GUN AND DRUGS FOUND IS MERELY ASSUMED, THAT THE DEFENDANT IS GUILTY OF USING THE GUN IN CONNECTION WITH A DRUG TRAFFICKING OFFENSE?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, Appellee/Respondent

v.

STEVEN LYMAN, Appellant/Petitioner

The Clerk will enter my appearance as Counsel of Record for Steven Lyman, who in this Court is Petitioner.

I certify that I am a member of the Bar of the Supreme Court of the United States.

JOSEPH S. FRIEDBERG, CHARTERED

Signature: By: _____

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, Appellee/Respondent

v.

STEVEN LYMAN, Appellant/Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Steven Lyman, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

PARTIES TO THE PROCEEDING BELOW

Steven Lyman

The United States of America

OPINION BELOW

The Opinion of the Eighth Circuit is reported at 892 F.2d 751, and is reproduced in the Appendix, pp. 1-10.

JURISDICTION

The Court of Appeals' decision was filed December 29, 1989. Lyman's Petition for Rehearing and Rehearing En Banc was denied on February 22, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATUTE

18 U.S.C. § 924(c)(1):

> Whoever, during in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime . . . be sentenced to imprisonment for five years . . . .

STATEMENT OF THE CASE

The bulk of the facts were accurately stated by Judge Lay in his opinion for the Eighth Circuit:

> On August 19, 1988, Minneapolis police officers obtained a warrant and searched Lyman's apartment. In a kitchen drawer and one cabinet, the police found cocaine

> and paraphernalia used in weighing, cutting, and packaging the drug. The cabinet also contained ammunition. In another kitchen cabinet police found three or four cloth bags pulled shut with drawstrings. The record describes these as "Crown Royal" bags, originally manufactured to hold bottles of liquor sold under that brand name. One of these bags contained a loaded pistol. The ammunition found in the other cabinet contained no drugs or drug paraphernalia. The police found customer records and more cocaine in the adjacent dining area.

Appendix p. 2. Other germane facts are these:

- You couldn't tell from the outside which Crown Royal bag might contain the gun. (T. 65, 70);

- Lyman's apartment wasn't a fortress, and his gun was not openly available for quick use; given its location, he couldn't have just grabbed the pistol and fired willy-nilly. He had to find it first amongst the bags, get it out of the bag, and by that time, assuming danger lurked, it would have been too late;

- The bullets seized revealed manufacture in 1980-81, sale as late as 1982. (T. 93);

- The government investigation, typically aggressive, failed to reveal a single witness who had ever seen Lyman with the gun. (T. 94);

- Shortly after his arrest at the apartment, Lyman told police he'd been dealing cocaine for approximately two years (T. 135); that

he'd purchased the gun in 1982 (T. 122, 130); that he kept it as a collector's item (T. 131); that he'd used it only at a firing range in St. Louis Park, a "month or two" of the date of purchase; he'd not used it since. (T. 122, 131-32);

- The government's expert on narcotics trafficking, Minneapolis Police Officer John Boulger, said that in his 17 years of police work, he'd not run across a dealer, like Lyman, who had acquired a pistol before entering into the criminal fray. The progression is usually reversed, the dealer begins by selling, and then buys a gun for protection. (T. 94);

- Lyman denied any relationship between his cocaine business and the gun, which, he said, he essentially had forgotten about over the years. (T. 139) Surprised to hear of the enhancement of five years in prison for possession of a gun, Lyman added, "I had always believed as long as it was bought legally and registered, I was entitled to have it." (T. 135) If he'd known of the five year consecutive penalty, he wouldn't have had the gun in his apartment. (T. 135);

- Lyman admitted that, on occasion, he'd conducted drug transactions in his apartment. (T. 184)

A two count Indictment was handed down on September 14, 1988, charging Lyman with possession with intent to distribute cocaine, 21 U.S.C. § 841(a)(1) (Count I), and with 18 U.S.C.

§ 924(c)(1) using or carrying a firearm "during and in relation to any . . . drug trafficking crime" (Count II). Jurisdiction in the District Court was predicated on 18 U.S.C. § 3231. Trial commenced on December 8, 1988, with Lyman waiving a jury; he admitted Count I (possession), litigating solely the gun charge. On December 21, 1988, the District Court, the Honorable Harry H. MacLaughlin, convicted Lyman of both counts. The Court's finding re Count II reads: "The location and condition of the gun, the fact that (Lyman) conducted drug transactions in his apartment, and (Lyman's) evident need for protection, convince the Court that he (Lyman) intended the handgun to be available for *possible* use during drug transactions. (Paragraph 9, Findings of Fact and Conclusions of Law, attached in the appendix.) (Emphasis added.) On March 15, 1989, Lyman received 41 months for Count I; as for Count II, he received the mandatory five year consecutive sentence, 18 U.S.C. § 924(c)(1). He appealed to the Eighth Circuit, which found a "sufficient nexus between the gun and the drug trafficking offense," and affirmed. Appendix p. 11. Lyman's Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

By enacting 18 U.S.C. § 924(c)(1) in its present form, Congress gave the federal prosecutor a potent weapon, a five year club, if you will, that just about knocks out a defendant in a drug case. Not only

does the defendant do time for the substantive offense, but when the days have passed, he has to look five more years of hard time in the face. The circuit courts have struggled with the kind and quality of proof needed for a conviction under this statute, and have yet to adopt a uniform test; instead the case law is fractured, inconsistent, and piecemeal while the five year sentences continue to be imposed. For the sake of uniformity and in the interests of justice, this petition ought be granted. Rule 17.1.(1), Rules of the United States Supreme Court.

—

We begin with a short history of the statute to place our concerns in context. Before 1984, it was a federal crime to carry a firearm "during the commission of any felony . . . ." Title 18 U.S.C. § 924(c)(2) (1982). Congress then upped the ante. Title 18 U.S.C. § 924 was amended, establishing as a predicate offense "any crime of violence" instead of "any felony"; moreover, the phrase "during and in relation to" was substituted for the word "during". Pub. L.N. 98-473, 98 Stat. 1837, 2138-39. Because various circuit decisions which construed section 924 narrowly, holding a drug offense was not a "crime of violence", *see, e.g., United States v Cruz*, 805 F.2d 1464, 1468-69 (11th Cir. 1986); *United States v Meyer*, 803 F.2d 246, 248-49 (6th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1508 (1986), section 924 was further amended, in 1986, to add "drug trafficking

crime" as a predicate offense. The five year mandatory consecutive term was also included. Title 18 U.S.C. § 924(c)(1) (Supp. 1987); *see United States v Goodface*, 835 F.2d 1233, 1237 (8th Cir. 1987); *United States v Matra*, 841 F.2d 837, 842, n. 8 (8th Cir. 1988). A violation of 18 U.S.C. § 924(c) is, of course, an offense separate from the underlying felony. *United States v Eagle*, 539 F.2d 1166, 1171 (8th Cir.), *cert. denied*, 429 U.S. 1110 (1976). Legislative history indicates the "in relation to" language of 18 U.S.C. § 924 "was intended to make explicit that a person could not be prosecuted under section 924(c) for possessing a firearm during the commission of an entirely unrelated crime." S.Rep.No. 225, 98th Cong. and Admin. News 3182, 349992 n. 10. For an 18 U.S.C. § 924(c)(1) conviction to stand, then, more is required than mere possession of a firearm; the nexus between the firearm and the underlying crime, is established, Congress said, for example, "if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape." *Id., quoted in United States v Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir. 1988); *United States v Payero*, 888 F.2d 928, 929 (1st Cir. 1989).

Before reaching the germane cases it bears repeating that it is the defendant's due process right to be presumed innocent, *see Taylor*

v. Kentucky, 436 U.S. 478, 485 (1978). It's axiomatic that the government must prove criminal guilt beyond a reasonable doubt, *see In Re Winship*, 397 U.S. 358, 363 (1970); *Mullaney v Wilbur*, 421 U.S. 684, 700 (1975). Criminal intent is, of course, not to be assumed to exist, *see, e.g., Sandstrom v Montana*, 422 U.S. 510, 524 (1979).

In section 924 cases the Government has been pushing the strict liability approach, arguing that if the gun is in an apartment where dope is found, then surely the putative defendant intended to use it for drug trafficking. Thus far, the circuit courts have officially not embraced that view, *United States v Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir. 1989); *Lyman*, 892 F.2d at 752. Yet the gap between possession and intent, which should be narrow, has, by case law, increasingly widened, far beyond the sliver of congressional intent. On the one hand, there are two defense decisions, *United States v Feliz-Cordero*, 859 F.2d 250 (2d Cir. 1988) and *United States v Theodoropoulos*, 866 F.2d 587 (3rd Cir. 1989), *Cordero* holding that a handgun found in a dresser drawer located on the premises from which the agents also seized cocaine and related paraphernalia could not be used as the basis of a section 924 conviction because there had been no evidence presented to show that the gun was quickly accessible if needed, and the Court would not presume it was there merely to be used for drug trafficking, *Id.* at 254; and *Theodoropoulos* holding

where weapons found outside in a porch area of a defendant's apartment in which drugs were sold likewise were not used for drug trafficking offense: "We cannot agree with the government," the Third Circuit said, "that the mere availability of a firearm nearby, as distinguished from its open display, is equal to use 'in relation' to an offense." *Id.* at 597.

On the other hand, there are a series of cases where, if the house looks like an arsenal with multiple guns present, the presumption is that the guns are there for protection, and were used to facilitate narcotics trafficking, *see, e.g., United States v Matra*, 841 F.2d 837 (8th Cir. 1988); *United States v Moore*, 580 F. 2d 360 (9th Cir.), *cert. denied*, 439 U.S. 970 (1978); *United States v Robinson*, 857 F.2d 1006, 1010 (5th Cir. 1988); *United States v Meggett*, 875 F.2d 24 (2d Cir. 1989). Similarly, the circuits have held that where the gun in question is near the defendant at the time of the search and/or arrest, and a controlled substance is also present, that is proof enough for a section 924 conviction, *see, e.g., United States v Payero*, 888 F.2d 928, 929 (1st Cir. 1989); *United States v LaGuardia*, 774 F.2d 317, 318-19 (8th Cir. 1985). A section 924 conviction can also be had as well on an aiding and abetting theory, *see, e.g., United States v Brett*, 872 F.2d 1365, 1370-71 (8th Cir. 1989).

Into this entropic case law steps Steven Lyman, in prison for the first time in his life, now near completion of his term for distribution and about to start the next five years. The District Court convicted Lyman because the gun was "available for possible use during a drug transaction." His apartment certainly wasn't an arsenal; the gun wasn't found on his person; he didn't carry it anywhere. Certiorari ought be granted for these reasons:

- The District Court's finding that Lyman's gun was present for "possible" use is the same as saying Lyman had the gun available for presumed use. The Court drew an improper inference, finding intent where none was specifically proved. It's an inference inconsistent with the presumption of innocence, not to mention the teachings of *Feliz-Cordero*, 859 F.2d at 254 ("intent to use the firearm must (not) be presumed from the fact that a loaded gun was found in the course of a search pursuant to a warrant"), and *Theodoropoulos*, 866 F.2d at 597 ("mere availability of a firearm nearby, as distinguished from its open display, is (not) equal to use 'in relation' to an offense"). The District Court's finding, too, is inconsistent with the congressional intent, *see* S.Rep. No. 225, 98th Cong. and Admin. News 3182, 3492; *see* Rule 17.1.(a), Rules of the United States Supreme Court.

- There is a conflict within the Circuits as to the quantum of proof needed to sustain a section 924 conviction. *Compare Feliz-*

Cordero and *Theodoropoulos* with *Lyman*, see Rule 17.1.(a); Rule 17.2.

- It is in the interests of justice that this Court review Lyman's conviction. He must not spend five years serving time on a gun charge for a crime the District Court found was, by inference, possibly committed, *see*, Rule 17.1.(1).

CONCLUSION

Congress gave the United States Attorney an awesome and sobering tool in 18 U.S.C. § 924(c)(1), a statute of grave consequence to an unwitting defendant. The ambit of such a criminal statute must be construed narrowly, *Simpson v United States*, 435 U.S. 6, 14-15 (1978); *Busic v United States*, 446 U.S. 398, 406-407 (1980), in favor of the first time offender, Lyman, who has been improperly snared in, two circuit courts say, for five years by too wide a net.

Dated this 24 day of April, 1990.

Respectfully submitted,

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By: _____

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APPENDIX

UNITED STATES of America, Appellee,

v.

Steven LYMAN, Appellant.

No. 89-5157.

United States Court of Appeals,
Eighth Circuit.

Submitted Sept. 13, 1989.

Decided Dec. 29, 1989.

Before LAY, Chief Judge, BOWMAN and MAGILL, Circuit Judges.

LAY, Chief Judge.

Steven Charles Lyman was convicted of one count of possession with intent to distribute cocaine, 21 U.S.C. § 841(a)(1) (1982), and one count of the knowing and unlawful use of a firearm "during and in relation to a drug trafficking crime," 18 U.S.C. § 924(c)(1) (1982 & Supp. V 1987). He pleaded guilty to the first count but on the second he waived his right to a jury and stood trial before the district court.[1] The district court found him guilty on that count, and imposed the mandatory five-year term, to run consecutive to the sentence imposed for count one. Lyman appeals the judgment of conviction on the second count.

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[1]The Honorable Harry H. MacLaughlin, United States District Judge for the District of Minnesota.

FACTS

On August 19, 1988, Minneapolis police officers obtained a warrant and searched Lyman's apartment. In a kitchen drawer and one cabinet, the police found cocaine and paraphernalia used in weighing, cutting, and packaging the drug. The cabinet also contained ammunition. In another kitchen cabinet police found three or four cloth bags pulled shut with drawstrings. The record describes these as "Crown Royal" bags, originally manufactured to hold bottles of liquor sold under that brand name. One of these bags contained a loaded pistol. The ammunition found in the other cabinet fit this handgun. In the other Crown Royal bags the police found assorted coins, but this cabinet contained no drugs or drug paraphernalia. The police found customer records and more cocaine in the adjacent dining area.

The district court found that Lyman intended the handgun "to be available for possible use during drug transactions." The court emphasized that Lyman kept the gun in the kitchen where he also kept his supply of cocaine, and the gun was fully loaded. Because he intended to have the gun available, the court concluded that Lyman used the gun in relation to drug trafficking, in violation of 18 U.S.C. § 924(c)(1).

Lyman now urges on appeal that there existed an insufficient nexus between his possession of the firearm and his drug trafficking offense. He urges that he neither used nor carried the gun "during and in relation to any crime of violence or drug trafficking crime" as required to convict under 18 U.S.C. § 924(c)(1). The government urges that mere possession of a gun--even constructive possession--by a drug trafficker is sufficient evidence for conviction under section 924(c)(1).[2] We cannot agree that mere possession of a gun can sustain a conviction under section 924(c)(1). However, because in this case we find a sufficient nexus between the gun and the drug trafficking offense, we affirm the judgment of the district court.

DISCUSSION

Several other circuits have held that a conviction under section 924(c)(1) requires more than just possession of a firearm. In *United States v. Theodoropoulos*, 866 F.2d 587 (3d Cir. 1989), the court held that guns found in a trash can on a porch outside defendant's apartment could not be for *use* in relation to the drug offenses taking

---

[2]Under section 2D1.1(b)(1) of the sentencing guidelines the defendant may receive a two point enhancement for possession of a firearm during the commission of a crime. The Application Notes states plainly that "[t]he adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." United States Sentencing Commission, *Guidelines Manual*, § 2D1.1, Comment. (n. 3) (Nov. 1989).

place inside the apartment. The court therefore set aside one count of conviction for violation of section 924(c)(1). However, the court held that the defendant could be convicted of illegal *possession* of the guns pursuant to 26 U.S.C. § 5861 (1982). *Id.* at 595-97. Other circuits also have distinguished possession and use. *See United States v. McGhee*, 882 F.2d 1095, 1099 (6th Cir. 1989) (guns concealed in hidden compartments in defendant's house might not have been sufficiently readily available to support a conviction under section 924(c)(1), but under the lower guideline standard defendant could be found to possess the guns); *United States v. Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir. 1988) ("[S]ection 924(c) requires more than mere possession of a firearm").

The government argues that our decisions in *United States v. Matra*, 841 F.2d 837 (8th Cir. 1988), and *United States v. LaGuardia*, 774 F.2d 317 (8th Cir. 1985), stand for the proposition that mere possession suffices for conviction. The facts of these cases show, however, that the defendants did more than possess the guns; they created armed fortresses with several guns strategically placed for immediate use in an emergency. In *Matra*, police found ammunition in the kitchen, dining room, and in plain view in the two living rooms. They discovered loaded pistols hidden in the cushions of two living room sofas, and another gun sticking out of the zipper of a

vacuum cleaner bag. In one bedroom a pistol lay under the bedcovers, and in another bedroom the police found a loaded assault rifle, loaded submachine gun, and a loaded shotgun. This court held that although the defendant did not have a gun on his person, he had control over the guns and ready access to them, and they clearly were "an integral part of his criminal undertaking." *Id.* at 843. The court had no difficulty holding that this record sufficiently supported the finding that the defendant "used" the guns during and in relation to drug offenses.

In *LaGuardia*, a search of the defendants' apartment uncovered, in addition to drugs, a loaded pistol in a purse in the defendants' bedroom, a loaded gun on a shelf in their hallway, and a rifle in the trunk of their car. This court held that the presence and availability of the weapons was such that they "had undoubted utility in the protection of the valuable supply [of drugs] and of the cash on hand." *Id.*, at 321. In light of the evident need for protection, the evidence was sufficient to support the jury's conclusion that the defendants "used" the weapons in relation to their drug trafficking crime. *Id.* Clearly an abundance of loaded weapons strategically placed throughout a crack house amounts to more than mere possession; it shows readiness to use the weapons to support the drug operation should need arise.

The government also asserts that our decision in *United States v. Brett*, 872 F.2d 1365 (8th Cir.) *cert. denied*, ___ U.S. ___, 110 S.Ct. 322, 107 L.Ed.2d 312 (1989), represents a broad interpretation of "use". The police in *Brett* raided a crack house and found a gun in the possession of a person other than the defendant Gray, who fled the scene and was arrested several blocks away. The government implies that by upholding the section 924(c)(1) conviction against Gray, this court expanded the meaning of "use" beyond the holdings of *LaGuardia* and *Matra*. The government fails to note that Gray was found to be a co-conspirator in the distribution of cocaine from a crack house. Gray's co-conspirator admitted that he held the gun in order to provide security for the house's drug operations. *Id.* at 1368. This admission clearly proved intent by all members of the conspiracy to rely on the gun in an emergency.

While more than mere possession is required for a conviction under section 924(c)(1), the defendant need not actually brandish or discharge the weapon. *United States v. Matra*, 841 F.2d at 843. The legislative history makes clear that the key is whether the circumstances indicate "that the defendant intended to use the gun if a contingency arose or to make his escape." S.Rep. No. 225, 98th Cong., 2d Sess. 1, 314 n. 10 (1983) *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3492 n. 10. This court has held that

the intent to use a weapon or weapons in connection with a drug trafficking offense may be inferred by their "presence and availability in light of the evident need." *United States v. LaGuardia*, 774 F.2d at 321. We think the Second Circuit in *Feliz-Cordero* succinctly states the standard for determining "use" under section 924(c)(1):

> [I]n order for possession of a firearm to come within the "uses" provision of section 924(c), one of the following is required: i) Proof of a transaction in which the circumstances surrounding the presence of a firearm suggest that the possessor of the firearm intended to have it available for possible use during the transaction; or ii) The circumstances surrounding the presence of a firearm in a place where drug transactions take place suggest that it was strategically located so as to be quickly and easily available for use during such a transaction.

United States v. Feliz-Cordero, 859 F.2d at 254.

Based on this standard, the Second Circuit set aside a conviction for use of a gun found in a dresser drawer in the same apartment where the defendant kept drug paraphernalia. The court stated:

> On the evidence presented, there is no basis to conclude that the gun would have been quickly accessible if needed. Rather under the circumstances of this case, the intent to

> use the firearm must be presumed from the fact that a loaded gun was found in the same room as drug paraphernalia during the course of a search pursuant to a warrant. This is not sufficient evidence to sustain a conviction, even in light of our recognition of the frequent connection between firearms and narcotics trafficking.

Id. Lyman argues that finding a violation in this case contravenes the Second Circuit's admonition not to presume intent to use a firearm merely from the fact that it was found in the same room as drug paraphernalia.

We agree that this case is closer than *Matra, LaGuardia* or *Brett*. In *Matra* and *LaGuardia* an abundance of guns was in easy reach of the defendants. In *Brett* the gun was on the person of the defendant's co-conspirator, who admitted his intent to use it if necessary. In the present case a single loaded handgun was in a closed cloth bag in a kitchen cabinet next to two or three other outwardly identical bags.

Nevertheless, we think the totality of circumstances here provides a sufficient basis to infer Lyman's intent to use the gun. Moreover, while it is not necessary for us either to accept or reject the Second Circuit's ruling, we find here a stronger nexus between the gun and drug trafficking than was the case in *Feliz-Cordero*. In

Feliz-Cordero two brothers occupied apartments in the same building. The defendant, Feliz-Cordero, lived in apartment 3 and his brother, Feliz-Encarnacion, occupied apartment 5. A drug sale took place between a government informant and Feliz-Encarnacion in apartment 5. Some discussion of drug business among the two brothers and the informant occurred in apartment 3, but no drug sales. Later the police obtained a warrant to search both apartments 3 and 5. In apartment 5 the police found cocaine, cocaine base, and drug paraphernalia. In Feliz-Cordero's apartment they found a small quantity of cocaine, drug records, cash, a beeper, and, in a bedroom dresser drawer, a loaded revolver. 859 F.2d at 251-52. The opinion does not disclose whether all of the items seized from Feliz-Cordero's apartment were found together in the same room, nor whether the discussions of drug business took place in the bedroom where the revolver was stored. The case therefore does not reveal whether the gun was located in the same room or immediate vicinity where drug transactions actually occurred or were likely to have occurred, or where an agent or associate of a drug dealer might have stood guard during a drug transaction.

That fact distinguishes the present case. In the present case the record discloses that the gun was located in the area of the apartment where Lyman actually conducted his drug trade. All of the drug-

related evidence was seized from the kitchenette and its adjacent dining area.[3] Having a loaded gun present in the same area where transactions took place makes it more likely that the gun would have been available if needed, and hence that the defendant intended to use it in an emergency.[4] Based on the evidence in the record the district court was not clearly erroneous in finding that the presence and availability of the gun demonstrated intent to use it. The judgment of conviction is affirmed.

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[3]Lyman testified that he conducted drug transactions both in the apartment and away from it.

[4]The fact that a gun is located in a room that is not the center of drug transactions does not preclude the possibility that a drug dealer intended to use it to support his operations. Certainly if a drug house is an armed fortress with guns in several rooms, it is logical to surmise that even if the person actually conducting the transaction could not reach in an emergency some of the guns located in other rooms, he might rely on his associates to retrieve and use them in his aid. Each case turns on its specific facts. The key is always whether the placement of the gun or guns suggests they would be quickly available for use in an emergency.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-5157MN

United States of America,	*	
	*	
Appellee,	*	Appeal from the United States
	*	District Court for the
vs.	*	District of Minnesota.
	*	
Steven Lyman,	*	
	*	
Appellant.	*	

The suggestion for rehearing en banc filed by appellant has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

February 22, 1990

Order entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

United States of America,

Plaintiff,

v.

Steven Charles Lyman,

Defendant.

CRIM. 4-88-101

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

- -

Jerome G. Arnold, United States Attorney, and Lynn A. Zentner, Assistant U.S. Attorney, 234 U.S. Courthouse, Minneapolis, MN 55401, for plaintiff.

Joseph S. Friedberg, 250 Second Avenue South, Minneapolis, MN 55402, for defendant.

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The above-captioned case came on for trial on Thursday, December 8, 1988, based on a two-count indictment returned by the United States Grand Jury on September 14, 1988. Count I charged defendant Steven Charles Lyman with knowingly or intentionally possessing with intent to distribute 463 grams of cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1). Count II charged the defendant with using or carrying a firearm during and

in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1).

Present at trial were the defendant, his attorney Joseph Friedberg and Assistant United States Attorney Lynn A. Zentner. The defendant moved the Court for trial without a jury. With the consent of the government and the approval of the Court, a written waiver of jury trial was executed by the defendant and both counsel pursuant to Federal Rule of Criminal Procedure 23(a).

Upon all the evidence presented at trial, the Court makes the following

FINDINGS OF FACT

As to Count I:

1. On or about August 19, 1988, defendant possessed approximately 463 grams of cocaine, a Schedule II controlled substance.

2. The defendant possessed the cocaine knowingly and intentionally.

3. The defendant intended to distribute the cocaine he possessed.

As to Count II:

1. On or about August 19, 1988, defendant owned a Walther semi-automatic 9mm handgun which he kept in a kitchen cupboard to the left of the sink.

2. Defendant stored ammunition for the handgun in a kitchen cupboard to the right of the sink on the same shelf where he kept the bulk of his cocaine supply.

3. The handgun was kept loaded and ready to fire.

4. The location of the handgun was such that it was quickly and easily available to defendant.

5. Defendant stored, weighed, and packaged his cocaine in the kitchen of his apartment.

6. Defendant conducted drug transactions in his apartment.

7. The drug business is, in general, a dangerous business and defendant, in particular, had a need to protect his supply of cocaine, his cash and his person.

8. Defendant was not truthful when he claimed to have forgotten about the firearm a long time prior to his arrest and when he claimed not to have believed himself in danger from either his customers or his suppliers prior to his arrest.

9. The location and condition of the handgun, the fact that defendant conducted drug transactions in his apartment, and defendant's evident need for protection, convince the Court that

defendant intended the handgun to be available for possible use during drug transactions.

Based upon the preceding Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

1. Defendant Steven Charles Lyman is guilty as charged in Count I of the indictment beyond a reasonable doubt.

2. Defendant Steven Charles Lyman is guilty as charged in Count II of the indictment beyond a reasonable doubt.

Judge Harry H. MacLaughlin
United States District Court

DATED: December 15, 1988

MEMORANDUM

The only disputed issue in this case is whether defendant "use[d]" a firearm "during and in relation to . . . drug trafficking," as prohibited by 18 U.S.C. § 924(c)(1).

The most detailed discussion of the "use" element of section 924(c)(1) is contained in a recent case from the United States Court of Appeals for the Second Circuit, *United States v. Feliz-Cordero*,

Nos. 88-1146, 88-1147, slip op. (2d Cir. Oct. 11, 1988) [1988 U.S. App. LEXIS 14296]. In that case, the Second Circuit held that:

> The necessary relation or connection between possession of a firearm and the underlying crime is established "if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape."

1988 U.S. App. LEXIS 14296 at 6, *quoting* S.Rep.No. 225, 98th Cong., 2d Sess. 1, 314 n.10 (1983). The court determined that this standard requires either:

> i) Proof of a transaction in which the circumstances surrounding the presence of a firearm suggest that the possessor of the firearm intended to have it available for possible use during the transaction; or ii) The circumstances surrounding the presence of a firearm in a place where drug transactions take place suggest that it was strategically located so as to be quickly and easily available for use during such a transaction.

1988 U.S. App. LEXIS 14296 at 6. The *Feliz-Cordero* court reversed a conviction based on a loaded gun found in a dresser drawer in the same room where drug paraphernalia was found. *Id.*

The United States Court of Appeals for the Eighth Circuit has considered section 924(c)(1) in two opinions. The court, in *United States v. LaGuardia*, 774 F.2d 317 (8th Cir. 1985), stated that section 924(c)(1) "reaches possession of a firearm which in any manner facilitates the execution" of the underlying crime. 774 F.2d at 321. In that case, a search of defendant's home had found, in addition to

eighteen ounces of almost pure cocaine and $10,000 cash, three firearms -- a loaded pistol inside a purse on a bed, another loaded pistol on a shelf in a closet among numerous items of clothing, and a rifle inside the trunk of the defendant's car. *Id.* at 318. The contents of the purse indicated that it was currently being used. *Id.* at 319. The court found that the obvious need to protect the drug supply and cash and the "availability" of the weapons was sufficient to support the submission of a charge under section 924(c)(1) to the jury. *Id.* at 321.

In *United States v. Matra*, 841 F.2d 837 (8th Cir. 1988), the section 924(c)(1) charge was based on the discovery of several loaded weapons hidden at various locations inside "a crack house" (*id.* at 841) which the court termed "a veritable fortress." *Id.* at 842. The court found that defendant used the guns as part of "'a tight security operation to protect large quantities of cocaine and hence to commit the felony of possessing cocaine with intent to distribute it.'" *Id.* at 842-43, *quoting United States v. Grant*, 545 F.2d 1309, 1312 (2d Cir. 1976).

Neither *LaGuardia* nor *Matra* provide much guidance for the application of section 924(c)(1) on facts such as those presented in this case. The reasoning in both cases is, however, consistent with the standard established by the Second Circuit in *Feliz-Cordero*.

Under all three cases, use of a firearm can be established for the purposes of section 924(c)(1) by evidence that the firearm was strategically located for possible use during drug transactions.

In *Feliz-Cordero*, two defendants with apartments on separate floors of the same building were convicted of conspiring to distribute, possessing with intent to distribute and distributing cocaine. An informant purchased cocaine base from one of the defendants in the upstairs apartment. A subsequent search of that apartment found cocaine and cocaine base, plastic vials, a scale, a hot plate, strainers, straight edge razor blades, and chemicals used to cut cocaine. During a search of the downstairs apartment, the government discovered a small quantity of cocaine, drug records, approximately $11,000 cash, a beeper, and, in a bedroom dresser drawer, a loaded .38 caliber revolver and additional rounds of ammunition. The Court of Appeals found that there was no basis to conclude that the revolver "would have been quickly accessible if needed." 1988 U.S. App. LEXIS 14296 at 6.

> [U]nder the circumstances of this case, the intent to use the firearm must be presumed from the fact that a loaded gun was found in the same room as drug paraphernalia during the course of a search pursuant to a warrant. This is not sufficient evidence to sustain a conviction, even in light of our recognition of the frequent connection between firearms and narcotics trafficking.

Id.

The evidence against defendant Lyman does suggest that he intended the gun to be quickly and easily available for use during his drug transactions. His handgun was kept in the kitchen where he also kept his supply of cocaine (the amount seized had a value of about $34,000) and the equipment he used to measure, cut and package cocaine for sale. Thus, the handgun was located in the area that was the center of defendant's drug operations. It was fully loaded, with six rounds in the magazine and one in the chamber, and ready to fire. Although defendant testified that he had forgotten about the handgun and that he was not in danger from either his customers or his suppliers, the Court does not believe defendant's testimony. At a number of points in his testimony, defendant demonstrated a lack of trustworthiness and veracity. For example, defendant related that he had moved from one apartment to another in the same building approximately eight months before the search and arrest. Although he claimed to have bought the gun because it had value as a collector's item, he states that, by the time of his move, he had forgotten about the gun and that one of the friends who was helping him move must have transported it from one apartment to the other. It is not believable that defendant forgot about a fully-loaded, ready-to-fire handgun, which he kept as a collector's item. Nor is it believable

that defendant neither warned his friends about the dangerous handgun nor had the weapon called to his attention by them.

In this case, unlike in *Feliz-Cordero*, the evidence supports a finding that defendant strategically located the handgun so that it would be quickly and easily available for use during drug transactions.

H.H.M.

(2)

No. 89-1634

Supreme Court, U.S.
FILED
JUN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

STEVEN LYMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction under 18 U.S.C. 924(c)(1) (Supp. V 1987) for using a firearm in connection with a drug trafficking offense.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 892 F.2d 751.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1990. A petition for rehearing was denied on February 22, 1990. Pet. App. 11. The petition for a writ of certiorari was filed on April 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the District of Minnesota, petitioner was con-

victed on one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). After a bench trial, he was also convicted of using a firearm in connection with a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1) (Supp. V 1987). Petitioner was sentenced to 41 months' imprisonment on the drug possession count, and to a consecutive term of five years' imprisonment on the firearm count. The court of appeals affirmed. Pet. App. 1-10.

1. The evidence at the trial showed that on August 19, 1988, Minneapolis police officers searched petitioner's apartment pursuant to a warrant. They discovered cocaine and cocaine-related paraphernalia in a kitchen drawer and one kitchen cabinet. The same cabinet contained ammunition. The ammunition fit a semi-automatic 9 mm. handgun, which was found in a cloth bag in another kitchen cabinet. The gun was fully loaded, with six rounds of ammunition in the magazine and one round in the chamber. The police found customer records and more cocaine in an adjacent dining area. Pet. App. 2, 14-15, 19-20.

The district court found that the handgun was located in a place that made it quickly and easily available to petitioner; that petitioner had conducted drug transactions in his apartment; that he stored, weighed, and packaged his cocaine in the kitchen; and that petitioner's assertion that he had forgotten about the presence of the gun was not truthful. Pet. App. 14. The district court concluded that petitioner possessed the gun for use "during and in relation to" a drug trafficking crime in violation of Section 924(c)(1), because he had "strategically located the handgun so that it would be quickly and easily available for use during drug transactions." Pet. App. 20.

2. The court of appeals rejected petitioner's claim that there was an insufficient nexus between his possession of the firearm and his drug trafficking offense. Noting that

"more than mere possession is required for a conviction under section 924(c)(1)," Pet. App. 6, the court decided that the critical question is "whether the circumstances indicate 'that the defendant intended to use the gun if a contingency arose or to make his escape,' " *ibid.* The court then approved the standard set forth by the Second Circuit in *United States* v. *Feliz-Cordero*, 859 F.2d 250 (1988), for determining what indicates "use" for purposes of Section 924(c)(1): "Use" is demonstrated if "the circumstances surrounding the presence of a firearm suggest that [its] possessor * * * intended to have it available for possible use during the [drug] transaction," or if "[t]he circumstances surrounding the presence of a firearm in a place where drug transactions take place suggest that it was strategically located so as to be quickly and easily available for use during such a transaction." Pet. App. 7 (quoting *Feliz-Cordero*, 859 F.2d at 254).

Here, the court of appeals noted, the evidence was stronger than that found insufficient in *Feliz-Cordero*. The gun was located in the area of the apartment where petitioner actually conducted his drug trade. All of the drug-related evidence was seized from the kitchen and its adjacent dining area, and petitioner conceded that he had conducted drug transactions in the apartment. Pet. App. 8-10. "Having a loaded gun present in the same area where transactions took place," the court concluded, "makes it more likely that the gun would have been available if needed, and hence that the defendant intended to use it in an emergency." Pet. App. 10. The court therefore affirmed the district court's finding that under the particular circumstances of this case, "the presence and availability of the gun demonstrated intent to use it." *Ibid.*

ARGUMENT

Petitioner's fact-bound claim (Pet. 5-11) that the evidence failed to show a nexus between his possession of the firearm and his drug trafficking offense has been resolved against him by both courts below. It warrants no further review.

As the court of appeals observed (Pet. App. 10 n.4), each case arising under the "use" clause of Section 924(c)(1) turns on whether the facts indicate that "the defendant intended to use the gun if a contingency arose or to make his escape." Pet. App. 6 (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 314 n.10 (1983)).

In this case, there was ample evidence supporting the district court's factual finding. Petitioner, who conceded that he transacted his drug business in his apartment, kept his gun within easy reach of the place where he stored his cocaine (the amount seized had a value of $34,000) and the equipment for weighing, cutting, and packaging it. He stored his ammunition on the same shelf as the cocaine, and he kept the gun fully loaded. Thus the gun, ready to fire, was "in the area that was the center of [petitioner's] drug operations." Pet. App. 19. In addition, the district court found that petitioner had "demonstrated a lack of trustworthiness and veracity" in his testimony about the presence of the gun. *Ibid.* Under these circumstances, the court of appeals was clearly correct in affirming petitioner's conviction.

Contrary to petitioner's contention, none of the decisions he cites would support the reversal of his Section 924(c)(1) conviction. In *Feliz-Cordero*, the Second Circuit agreed with the court of appeals in this case that a sufficient nexus between a firearm and a drug offense would be demonstrated if the defendant "intended to use the gun if a contingency arose or to make his escape." 859 F.2d at 254

(quoting S. Rep. No. 225, *supra*, at 314 n.10 (emphasis omitted). Then, applying the same standard that the court used in this case, the Second Circuit determined that the facts in that case did not demonstrate the requisite intent. See 859 F.2d at 254.

In *Feliz-Cordero*, the police found a large amount of cocaine and cocaine paraphernalia in one apartment where a drug sale had taken place. In another apartment they found a small amount of cocaine, drug records, $11,000 in cash, a beeper, and, in a bedroom dresser drawer, a loaded revolver. No drug sale had been made in the second apartment (although some payment for and discussions about a previous sale had been held there). The court did not determine that drug sales normally took place in the room where the gun was found, nor even that the gun was in the close vicinity of the small amount of cocaine found in the second apartment. As the Second Circuit concluded, "there [was] no basis to conclude that the gun [in a bedroom drawer] would have been quickly accessible if needed." 859 F.2d at 254. In this case, on the other hand, the district court quite reasonably concluded that the gun was strategically placed for quick access. Pet. App. 20.

Nor does *United States* v. *Theodoropoulos*, 866 F.2d 587, 595-598 (3d Cir. 1989), aid petitioner. There the conviction depended on a finding that three firearms found in a trash can on the porch outside the defendant's apartment were used in connection with the narcotics conspiracy. There was no finding that the apartment had been used as the location for drug sales, although it was the home of persons involved in drug transactions and served as a storage place for drugs. Like both the Second Circuit and the court in this case, the Third Circuit in *Theodoropoulos* expressly approved the *Feliz-Cordero* standard for determining whether a gun was "used," see 866 F.2d at 597; the Third Circuit, like the Second Circuit in *Feliz-Cordero*,

simply determined that the test was not met on the facts of that case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1990

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/00954

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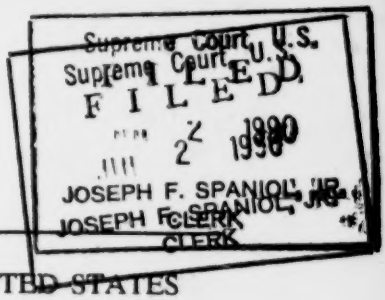
No. 89-1634



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, Appellee/Respondent

v.

STEVEN LYMAN, Appellant/Petitioner

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION

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The government would have this Court view Lyman's Petition as simply one that challenges the sufficiency of the evidence. (Brief in Opposition, Question Presented.) If that were the issue we wouldn't have bothered with a Certiorari Petition.

The gun in question was found inside a cloth bag, one of four identical bags, each labelled "Crown Royal" as in the liquor; each one, in turn, closed by draw strings. From the outside there was no way to determine which bag had the gun. Yes, the gun was loaded, but with bullets that were manufactured in 1981, likely sold in 1982, corroborating Lyman's testimony that he had purchased the firearm that same year, had fired it once or twice at a range, and had not used it since. No one ever saw Lyman use that gun during or in relation to a drug trafficking crime. He never did.

In passing 18 U.S.C. 924 (c)(1) Congress intended that a putative defendant not be convicted for this offense unless the defendant "***intended*** to use the gun if a contingency arose or to make his escape." S.Rep.No. 225, 98th Cong. and Admin. News 3182, 3492 n. 10 (emphasis added). Surely no one will say Lyman had the gun so that he would use it to escape from his own apartment. That's absurd. To say, as the government does in its opposition brief, that Lyman had the gun around if a contingency arose (Brief in Opposition, page 4), is nonsense as well. The fact of the matter is that the gun was not readily available because it was in a shut bag, on a shelf with other bags. If Lyman had the gun on his person, in a kitchen drawer, in a holster available for ready use, well, he'd be guilty of a 924(c) violation beyond any doubt. Instead the trial court, and the

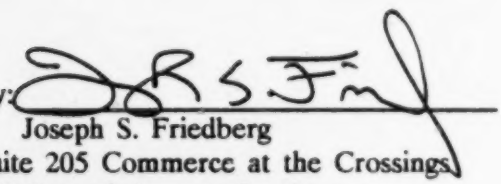
Court of Appeals for the Eighth Circuit, found the gun was available for "possible" use, which is to justify the conviction on the basis of surmise, and defeat the congressional intent.

Lyman's Petition ought to be granted.

Dated this 2nd day of July, 1990.

Respectfully submitted,

JOSEPH S. FRIEDBERG, CHARTERED

By: 

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